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In the Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE CAVAZOS OLIVARES,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court and Court of Appeals err in holding that an alleged conspirator, who joins a conspiracy already in progress but withdraws and disavows the conspiracy immediately and before any overt act is performed by him, is still criminally liable as a conspirator?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Comes now the Petitioner George Cavazos Olivares, and submits this, his Petition for Writ of Certiorari in the above styled and numbered cause.

OPINIONS BELOW

The opinion of the Court of Appeals below was not reported. The opinion of the District Court below was not reported.

JURISDICTION

The judgment of the Court below was entered on June 4, 1984. Rehearing was denied summarily on July 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1).

STATUTES INVOLVED

The statutes under which Petitioner was prosecuted, though nothing turns on its terms, was 21 U.S.C. Sect. 841(a)(1) which provided as follows:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> 1. to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; and,

21 U.S.C. Sect. 846 which provided as follows:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

INDICTMENT FOR ONE COUNT OF CONSPIRACY TO DISTRIBUTE MARIJUANA AND ONE COUNT OF POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE AND ONE COUNT OF ATTEMPTED DISTRIBUTION OF MARIJUANA	July 5, 1983
JURY SELECTED AND EMPANELLED	September 19, 1983
VERDICT OF GUILTY OF CONSPIRACY RETURNED	September 21, 1983
JUDGMENT AND COMMITMENT ORDER 3 YEARS	October 31, 1983
NOTICE OF APPEAL GIVEN	November 9, 1983
OPINION RENDERED	June 4, 1984
REHEARING DENIED	July 8, 1984
MOTION FOR STAY OF MANDATE DUE	July 23, 1984
PETITION FOR CERTIORARI DUE	August 2, 1984

STATEMENT OF MATERIAL FACTS

The Appellant, George Cavazos Olivares, was indicted in a multi-count indictment of conspiracy to deliver marijuana, possession of marijuana and attempted delivery of marijuana. Also indicted and tried simultaneously were Ramon Garcia, Lazaro Saenz and Silvia Garcia. Erasmo Lucio, also indicted, was not tried with the other defendants. Evidence, as set out hereinafter, was adduced at trial.

Manual Segovia ("Segovia"), a McAllen Police Officer, was working as an undercover narcotics officer, using the name Alonso (R.II-20, 23; R.III-221). Through the defendant Erasmo Lucio ("Lucio"), he was introduced to defendant Ramon Garcia ("Ramon") on January 27, 1983 (R.II-23, 25, 37). At. Ramon's home, Segovia offered to buy marijuana with the $38,000 he had (R.II-29). A deal was struck for the purchase of 116 pounds of marijuana (R.II-29).

Segovia then left to get the money from his "money man", undercover officer Manual Garcia ("Manual") (R.II-29). Segovia also filled up his car's tank with gas because according to Ramon, the marijuana was "a long ways away" (R.II-31-32). Segovia and Manual went back to Ramon's home, showed Ramon the purchase money and waited there (R.II-33-35).

A Juah Reyes ("Juan") drove away Segovia's car (R.II-34). Ramon made a call and said to "load up (the car) I've seen the money". (R.II-34).

Some time later, Reyes returned with Appellant George Olivares (R.II-36). Appellant took an immediate dislike and distrust to Segovia, and asked him if he was a narc. Appellant then told him the deal was off. By phone, Appellant also told someone to unload the car (R.II-36-39). Subsequently, the car was returned, and Ramon told Segovia he hoped they could do business sometime later (R.II-40). After Segovia left Ramon's home, he had the trunk of the car vacuumed. A very small quantity of marijuana residue was found (R.II-40, 111).

Officer David Ramos of the McAllen Police testified that he followed Juan, who was driving Segovia's car on January 27, 1983 (R.II-118-122). The car went to a trailer owned by Appellant where the driver talked to a stranger (R.II-120-123). It then went to a small ranch. After leaving the ranch, the police lost sight of the car (R.II-122). This was approximately the same time that they were informed that Segovia's purchase had been rejected (R.II-122).

That testimony was the extent of Appellant's involvement at trail. Defendant Ramon Garcia, in his testimony, reiterated that Appellant came over to Ramon's house but refused to sell to Segovia (R.III-229-30). The government proved up several other subsequent abated marijuana buys (R.II-42-57; R.II-58-63) and one buy of a pound of marijuana (R.II-65-68). None of these other transactions involved Appellant in any fashion.

Appellant presented no defense witnesses and moved for instructed verdicts at the end of the state's case in chief and after rebuttal (R.II-170; R.II-271). All counts except count one were dismissed by the Court at the end of the case in chief (R.II-168).

Based upon that evidence, Appellant was convicted of the conspiracy count. The Court assessed punishment at three (3) years confinement. This appeal is taken therefrom.

SIGNIFICANCE OF QUESTIONS RAISED AND REASONS FOR ALLOWANCE OF WRIT

This is a case of first impression under the Federal Conspiracy to deliver a controlled substance Statutes 21 U.S.C. § 841, 846. The Fifth Circuit has decided an important question of Federal law in conflict with established principals of the "withdrawal" defense.

By inference alone, the Fifth Circuit found that Petitioner Olivares may have been involved in the conspiracy in that he *may have* loaded a car with marijuana. There was no direct proof of this fact, but a couple of marijuana seeds were found in the trunk of the informant's rented car. The seeds may have been present in the car long before the alleged transaction occurred. The car was driven to a trailer home *owned*, but not occupied, by Petitioner Olivares.

Aside from this rather attenuated nexus, the record shows that Petitioner Olivares came to meet the informant and told him there was no deal. Petitioner then left. No transaction ever occurred.

There is no proof that Petitioner Olivares in any way took part in the preparatory meetings. Petitioner was never observed near the scene of any alleged preparatory action. Indeed, the only involvement Petitioner had in the transaction was to call it off. It cannot be gainsaid that such action affirmatively and unequivocally defeated the object of the conspiracy — a sale of marijuana.

The Court of Appeals could not point to one overt act committed during Petitioner's involvement in the conspiracy, if any. Instead, the Court ruled that Petitioner was criminally liable for overt acts committed prior to his entry into the conspiracy.

Such a ruling makes a withdrawal defense impossible to all but the founding conspirators, and there is a denial of the equal protection of the law. The overt act requirement is intended as a limitation on the withdrawal defense in order to better determine "intent to effectuate the conspiracy". *See, United States v. Gypsum*, 98 S.Ct. 2864, 2877 (1978). Now the Petitioner's intent to effectuate is being presumed by the acts of conspirators which occurred prior to the Petitioner's involvement.

The Fifth Circuit clearly indicates that it has no guidelines to follow in ascertaining whether withdrawal is possible under these circumstances. Otherwise, Petitioner's actions are a textbook example of disavowal and withdrawal.

See, United States v. Nicoll, 664 F2d 1308, 1315-6 (5th Cir. 1982) and United States v. Jimenez, 622 F2d 753, 755 (5th Cir. 1980).

CONCLUSION

The Supreme Court should address the issue of withdrawal from a conspiracy in-propers and hold that an alleged conspirator who has committed no overt act in further areas of the conspiracy and was not a member of the conspiracy at anytime when an overt act was committed, may withdraw from the conspiracy without criminal liability.

Respectfully Submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this the 20th day of July, 1984.

CHARLES CAPERTON

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2695
Summary Calendar

UNITED STATES OF AMERICA,

Plantiff-Appellee,

versus

RAMON ALANIZ GARCIA and
GEORGE CAVAZOS OLIVARES,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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(June 4, 1984)

Before GEE, POLITZ, and JOHNSON, Circuit Judges.

PER CURIAM:*

Appellants Ramon Alaniz Garcia and George Olivares were tried by a jury together with Garcia's

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

wife and another by the name of Lazaro Vega Saenz. The indictment alleged nine counts. After hearing the government's case, the district court dismissed all counts except Count 1 (conspiracy to distribute marijuana) and Count 8 (distribution of 338 grams of marijuana). Garcia's wife and Saenz were acquitted. Garcia was convicted on both counts and Olivares was convicted on the conspiracy count only. Garcia was sentenced to concurrent terms of five years' imprisonment on each count, to be suspended except for 179 days in actual custody, with a special parole term of five years on the distribution count. Olivares, who had a prior drug-related conviction, was sentenced to three years' imprisonment. Garcia and Olivares filed timely notices of appeal.

These convictions result from an investigation initiated by state narcotics agents. The government presented evidence showing that appellant Garcia, over a period of several months, negotiated numerous deals to sell marijuana to one of the undercover agents and made an actual sale. The government also presented evidence indicating that Olivares was the owner of the marijuana in one of the deals arranged by Garcia which ultimately was aborted. Appellant Garcia testified at the trial and raised the defense of entrapment. Appellant Olivares presented no defense and chose not to testify.

The government's case against the two appellants was based almost entirely on the following testimony of Manuel Segovia, an undercover narcotics agent for the McAllen, Texas, Police Department: Segovia received a tip from an informant that a certain individual by the name of Erasno Lucio would sell him marijuana. (Lucio is the cousin of Garcia's wife.) Lucio subsequently introduced Segovia to Garcia at Garcia's home. On January 28, 1983, Segovia told Garcia and Lucio that he had $38,000 with which to purchase marijuana, whereupon the two calculated that he could purchase 116 pounds at $375 per pound. Segovia's partner, also named Garcia, brought the money to Garcia's home and displayed it to Garcia and Lucio. Segovia's partner then took the money away for security reasons. Garcia placed a call to someone telling the party that he had seen the money and they were ready to load up. Garcia then directed Segovia to give his keys to another individual present, Reyes, who drove away in Segovia's car to pick up the marijuana. While they waited, Garcia stated to Segovia that he hoped the deal "would go down right" and they they would have future dealings together. Garcia also stated that he had two large loads of marijuana (400 pounds and 600-800 pounds) coming in soon. Later that day, Reyes returned, accompanied by appellant Olivares. Olivares immediately became suspicious of Segovia and accused him of being a narcotics agent. Around that time, the telephone in the Garcia home rang. Olivares answered it and told the party to "unload the car." Garcia then informed Segovia that the deal was off because Olivares was the "owner of the weed." Segovia then left, but returned

later that night to retrieve his car. Garcia apologized to Segovia for Olivares' actions, and offered to try to procure marijuana for him in the future. Segovia later searched his car and found marijuana residue in the trunk.

David Ramos, a narcotics investigator, testified that he followed Segovia's car that day. It was driven to appellant Olivares' trailer house, whereupon a new driver took the car and drove it to a small ranch. There the car was placed in a closed garage for about an hour. Ramos then followed the car to a convenience store where the driver left the car and made a short telephone call. Ramos continued to follow the car and a high-speed chase ensued. At about that time, Ramos was notified by radio that Segovia's deal with Garcia had been called off and that the car should be stopped. However, the vehicle managed to get away.

Segovia also testified that, in the following three months, he continued to negotiate deals with Garcia. On February 16, 1983, he showed Garcia a quantity of money which he represented to be $150,000, and made a deal to purchase 350 pounds of marijuana. The following day, Segovia returned to Garcia's house with a U-Haul truck. Another individual drove the truck away to pick up the marijuana, but the truck was returned empty. Garcia again apologized that he was unable to deliver the marijuana. On March 12, while Garcia was at work, Garcia's wife and Reyes tendered a one pound sample of marijuana, which Segovia rejected upon their suggestion that it was of poor quality, after discussing the matter on the

telephone with Garcia. On March 31, Garcia and Reyes tendered another one pound sample which Segovia purchased for $425. On April 5, Garcia indicated that he could obtain cocaine for sale, but no sale was ever consummated.

Garcia presented a defense based on the theory of entrapment. He testified that he was 36 years old and had never been in any trouble before. He had worked as a fireman for 11 years and at a second job as a mechanic for 4 or 5 years. Garcia testified that Segovia had made persistent calls to Lucio's home, asking if he or anyone he knew could help him procure marijuana. Segovia represented to Lucio, and later to Garcia, that his name was Alonso and that he was from a large crime family in Houston. Lucio's mother testified that her son had been called repeatedly by a person named Alonso, and that her son had tried to avoid the calls. Garcia testified that Lucio brought Segovia to his home three times before January 28, and each time he, Garcia, stated that he did not get involved in such matters. Narcotics agent Tony Pena, Jr., verified that the Garcia house had been under surveillance several times before January 28. Garcia testified that Lucio continued to receive calls from Segovia because Segovia believed that he, Garcia, must know someone who dealt in marijuana by virtue of the fact that he drank in bars and knew lots of people. On January 28, Lucio brought Segovia to his home and Segovia to his home and Segovia showed them $38,000 in cash. Garcia then decided to call Olivares, whom he had known for about six months,

because he thought Olivares might know someone who would deal in marijuana. Garcia stated that he sent Reyes, another of his wife's cousins, to pick up Olivares in Segovia's car. (The two, for no apparent reason, returned in Olivares' car.) Olivares immediately became suspicious of Segovia and refused to deal with him. Garcia testified that neither he nor Olivares received a telephone call during that meeting. He stated that he did not know where Segovia's car went after Reyes left it at Olivares' trailer house.

Garcia testified that, after the meeting with Olivares, Segovia began calling him three and four times a day and coming by his house to inquire whether he could arrange another deal. On cross-examination, Segovia confirmed telephone records provided to the defense by the government indicating that he had called Garcia at least 30 times between March 27 and May 14. (Segovia could not be sure whether he called Garcia before March 27 and had no record on the matter.) Garcia admitted that he had represented to Segovia that he could obtain large amounts of marijuana and that he was motivated to help him locate drugs because of the large amounts of cash shown to him. He did not admit that he had delivered the pound of marijuana eventually sold to Segovia. Garcia did, however, admit that he notified Segovia that they had a sample for him and that he was present when Reyes delivered the one-pound sample to Segovia inside a van in his own garage.

Entrapment

Appellant Garcia contends that the trial court erred in failing to grant his motion for judgment of acquittal on the grounds that the evidence presented established the defense of entrapment as a matter of law. Previously addressing such a claim, this Court stated:

> . . . "[I]t is well settled that the question of entrapment, if fairly raised, is one for the jury." United States v. Benavides, 558 F.2d 308, 310 (5th Cir. 1977). The defendant must first present some evidence that the government agents induced him to commit the offense charged. *Id.; see also* United States v. Wolffs, 594 F.2d 77, 80 (5th Cir. 1979); United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952). Then the government must prove beyond a reasonable doubt that "the accused was ready and willing, without persuasion and was . . . awaiting any propitious opportunity to commit the offense." *Wolffs*, 594 F.2d at 80; *see also Benavides, supra; Sherman, supra.* Put another way, the key to an entrapment defense is the accused's predisposition to commit the crime. Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); Sherman v. United States, 356 U.S. 369, 372, 78 S.Ct. 819, 820, 2 L.Ed.2d 848 (1958); Sorrells v. United States, 287 U.S. 435, 448-4, 53 S.Ct. 210, 215, 77 L.Ed.413 (1932).

United States v. Lentz, 624 F.2d 1280, 1286 (5th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981). Thus, even if

appellant has produced sufficient evidence to show that the government induced the conduct, he cannot prevail on his claim of entrapment as a matter of law where the government has overcome this evidence by showing appellant's predisposition to commit the offense. *See* United States v. Anderton, 679 F.2d 1199, 1201 (5th Cir. 1982). The government met this burden based on appellant's admissions alone. Garcia's predisposition is convincingly demonstrated by the fact that, without encouragement, he pretended to be a big dealer in marijuana. And although he may not have been in the business of selling drugs initially, Garcia continued to negotiate with Segovia over a period of months, admittedly motivated by the sight of large amounts of cash. The fact that Garcia was not more successful in obtaining the marijuana was apparently not for his lack of trying. Based on evidence of Garcia's predisposition to commit the offense, the district court did not err in concluding that he was not entrapped as a matter of law.

It should, however, be noted that although a majority of the Supreme Court concluded in Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), that the defense of entrapment is never available to a predisposed defendant, a different majority in that case allowed for the possibility that convictions based on outrageous police misconduct could be overturned on either a due process theory or because of the Supreme Court's supervisory power over the lower federal courts. Cronin, Law of Entrapment, 14 *Suffolk U.L. Rev.*, 1212-13 (1980). (Entrapment is not a defense of constitutional magnitude. Id.)

Technically such a defense does not implicate the entrapment defense at all, but assuming that appellant has implicity raised such a contention, it is patent that the conduct of the narcotics agents in this case does not rise to the level of over-involvement contemplated in United States v. Hampton. *See generally* United States v. Tobias, 662 F.2d 381, 386 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982). Accordingly, Garcia's suggestion lacks merit.

Other Contentions

Both appellants argue that the district court committed reversible error in failing *sua sponte* to instruct the jury on the credibility of an accomplice witness. Because neither party either requested such an instruction or objected to the failure to give one, as required by Fed. R. Crim. P. 30, our review is limited by the "plain error" standard of Fed. R. Crim. P. 52(b), under which appellants must demonstrate the likelihood of an obvious and grave miscarriage of justice. *See* United States v. Varkonyi, 645 F.2d 453, 460 (5th Cir. 1981). Appellants fall far short of such a showing. Citing United States v. Sisto, 534 F.2d 616 (5th Cir. 1976), they assert that Segovia, the narcotics agent, is an accomplice as a matter of law. Although *Sisto* does involve the testimony of a narcotics agent, the case simply holds that the trial court should have *sua sponte* cautioned the jury the the agent's hearsay testimony was to be considered only for purposes of impeaching the credibility of one defendant. 534 F.2d at 623-26. Moreover, the holding in *Sisto* is inapplicable to the facts of the present case; Segovia's

testimony in regard to soconspirator's statements was not hearsay at all because it met the criteria set out in United States v. James, 590 F.2d 575, 582 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917 (1979). In any event, appellants have cited no relevant authority indicating that a narcotics agent is an accomplice as a matter of law and we have never so held. Accordingly, the consideration underlying the need for a cautionary instruction in reference to uncorrobated accomplice testimony, *i.e.,* that a contingent-fee arrangement might encourage an informer-accomplice to "frame" a specific target, is not present in this case. *See* United States v. McClure, 577 F.2d 1021, 1022-23 (5th Cir. 1978); United States v. Garcia, 528 F.2d 580, 587-88 (5th Cir.), *cert. denied,* 426 U.S. 952 (1976). The district court did not err in failing *sua sponte* to instruct the jury in this regard.

Appellant Olivares raises for the first time on appeal the defense that he withdrew from the conspiracy. "To prove withdrawal, a conspirator must show he acted affirmatively to defeat or disavow the purpose of the conspiracy." United States v. Nicoll, 664 F.2d 1308, 1315 n.6 (5th Cir.), *cert. denied,* 457 U.S. 1118 (1982), *citing* United States v. Killian, 639 F.2d 206, 209 (5th Cir.), *cert. denied,* 451 U.S. 1021 (1981). It is doubtful whether a stated desire to withdraw from a particular deal, without more, constitutes a withdrawal from the conspiracy. United States v. Nicoll, 664 F.2d at 1315; *see id.* at 1311 (conspirator backed out of deal because negotiations were taking too much of his time); *see also* United States v. Jiminez, 622 F.2d 753, 756-57 (5th Cir. 1980) (con-

spirator's statement that he wanted out of deal, instructing drug agent to deal with another, presented question of fact as to withdrawal). However, even if it is assumed that Olivares' actions would otherwise constitute a withdrawal, his withdrawal came too late to absolve him from the crime of conspiracy.

Although it is unsettled whether a conspirator can ever withdraw after consummation of the conspiracy in a case such as this where no overt act need be shown, it is quite clear that he may not withdraw after an overt act in furtherance of the conspiracy has been committed. United States v. Nicoll, 664 F.2d at 1315-16. The loading of marijuana into the trunk of Segovia's car constitutes such an overt act. Although there is no direct testimony on this matter, it can easily be inferred from circumstantial evidence that the car had been loaded with marijuana. Segovia testified that Olivares received a phone call at the Garcia home and told the caller to unload the car. Segovia further testified that, when his car was later returned to him, he found marijuana residue in the trunk. Another agent, Ramos, testified that the followed Segovia's car that day first to Olivares' trailer house and then to a ranch where the car remained in a closed garage for about an hour. This activity is consistent with the inference that the loading did occur, and is not otherwise explained by Garcia. Moreover, this loading necessarily took place after Olivares joined the conspiracy, because Olivares was the owner of the marijuana and there could be no deal without his approval. We note that the authorities do not make clear whether withdrawal would be possible if a

coconspirator, other than Olivares himself, had committed the overt act, *i.e.,* loading the marijuana or ordering it to be loaded. Nevertheless, since Olivares owned the marijuana, it can reasonably be inferred that Olivares gave the order to load it.

Having failed to request a jury instruction on withdrawal, Olivares cannot now complain that these factual inferences would have been decided by a jury in his favor. It would be a different matter if the district court had refused to give a requested instruction on withdrawal. However, Olivares chose not to testify and presented no defense. Based on the strong circumstantial evidence that he committed an overt act and thus could not have withdrawn from the conspiracy, it cannot be said that the district court's failure *sua sponte* to instruct the jury on the issue of withdrawal rises to the level of plain error.

Since we find no merit in appellants' complaints of the trial court proceedings, its judgment is

AFFIRMED.